PLEASE NOTE
A petition for writ of mandate has been filed. On October 1, 2004, the Sacramento Superior Court stayed operation of this decision pending the disposition of the writ petition.

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **RICHARD COELHO** From Request For Order To Show Cause Why The Department of Fish and Game Should Not Reinstate Appellant's Duties As Warden	SPB Case No. 02-1796 **BOARD DECISION** (Precedential) **No. 04-03** August 12, 2004

APPEARANCES: Richard Coelho, appellant, representing himself; Marguerite Seabourne, Assistant Chief Counsel, Department of Personnel Administration, on behalf of Respondent, Department of Fish and Game.

BEFORE: William Elkins, President; Sean Harrigan and Maeley Tom, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Department of Fish and Game (Department) refused to reinstate Richard Coelho (appellant) to his full duties as a Warden after appellant reinstated from disability retirement but refused to sign waivers that would allow the Department to proceed with a background investigation.

After reviewing the record in this matter, including the written and oral arguments submitted by the parties, the Board concludes that the Department could not, under these circumstances, condition appellant's reinstatement to his duties as a Warden upon appellant signing these waivers or his completion of a background investigation.

BACKGROUND

Factual Summary/Procedural History

Appellant began working as a Warden for the Department of Fish and Game in 1981. As a Department Warden, appellant's duties included enforcing laws and regulations relating to the conservation and protection of fish, wildlife and their habitats. In this position, appellant was designated as a "peace officer" and had a range of peace officer-related duties.

In 1995, appellant became physically unable to perform the essential functions of his position and applied for disability retirement with the California Public Employees Retirement System (PERS). PERS approved appellant's disability retirement. Approximately six years later, appellant applied to PERS for reinstatement to his former position on the grounds that he was now able to resume his duties as a Warden. After reviewing the medical information submitted, PERS ordered appellant reinstated from disability retirement effective December 11, 2001. On January 7, 2002, PERS rescinded appellant's reinstatement and ordered that appellant attend an Independent Medical Examination (IME). Appellant attended the IME and the results were submitted to PERS for review. Based upon the results of the IME, PERS ordered appellant reinstated as a Warden on March 11, 2002.

It was not until May of 2002, that the Department offered to reinstate appellant to his position, subject to the following conditions: the Department would conduct a thorough background investigation, including a polygraph examination, and the appellant would attend a Basic Peace Officer Academy and complete a field training

program. Appellant disagreed with the Department's position but, nevertheless, he completed a background questionnaire and had his fingerprints taken. He further advised Department officials that if he were going to be required to attend an academy, he wanted to attend the one located in San Bernardino.

One of the personnel managers from the Department enrolled appellant in the San Bernardino Peace Officer Academy beginning in June of 2002, as it had the earliest starting date. In the meantime, the Department did not immediately return appellant to paid status, claiming they planned to do so once appellant entered the peace officer academy.[1] PERS continued to pay him his disability retirement pay pending resumption of pay by the Department. Appellant did not enroll in the academy in June, however, and the Department did not put him back on the payroll.

In the interim, on or about May 28, 2002, appellant sent the Board an appeal alleging that the Department had constructively medically terminated him by refusing to put him back to work after being ordered to do so by PERS effective March 11, 2002. On October 15, 2002, an SPB Administrative Law Judge conducted a hearing on the issue of whether the Department had constructively medically terminated the appellant by not placing him back at work pursuant to PERS' decision. At this hearing, appellant argued that once PERS granted his request for reinstatement, the Department was unconditionally obligated to reinstate him to his position. The Department, on the other hand, argued that because the position is designated as a "peace officer" position, appellant first has to comply with all of the requirements of Government Code section

[1] Appellant claims he was never told this.

1031[2], including showing that he is of good moral character as determined by a background investigation, as well as complying with sections 850, 851 and 856 of the Department regulations, which mandate specific training for departmental peace officers.

In her Proposed Decision, the ALJ determined that the Department was required to reinstate appellant to his position on the payroll effective March 11, 2002 and to pay him any back salary, benefits and interests owed as a result of the Department's refusal to timely reinstatement him. The ALJ expressly did not decide the issue of what appellant may or may not need to do in order to obtain or "reactivate" his peace officer status. The ALJ ordered that the Department reinstate appellant as a Warden and noted that, if appellant failed thereafter to obtain or maintain his peace officer status, the Department could then take appropriate action, including a non-punitive termination.

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[2] Government Code section 1031provides:

Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards:

(a) Be a citizen of the United States or a permanent resident alien who is eligible for and has applied for citizenship, except as provided in Section 2267 of the Vehicle Code.

(b) Be at least 18 years of age.

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record.

(d) Be of good moral character, as determined by a thorough background investigation.

(e) Be a high school graduate, pass the General Education Development Test indicating high school graduation level, pass the California High School Proficiency Examination, or have attained a two-year or four-year degree from an accredited college or university. The high school shall be either a United States public school meeting the high school standards set by the state in which it is located, an accredited United States Department of Defense high school, or an accredited nonpublic high school. Any accreditation required by this paragraph shall be from an accrediting association recognized by the Secretary of the United States Department of Education. This subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of that amendment to be peace officer positions.

(f) Be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer. Physical condition shall be evaluated by a licensed physician and surgeon. Emotional and mental condition shall be evaluated by a licensed physician and surgeon or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. This section shall not be construed to preclude the adoption of additional or higher standards, including age.

The Board adopted this Proposed Decision at its meeting of December 3-4, 2002.

Following the issuance of the Board's decision, the Department reinstated appellant to the payroll, effective March 11, 2002, and reimbursed him for lost back pay and benefits. Appellant returned to work on January 6, 2003, but was placed in a desk job in the Department's Chino Hill's office, not in a field position where he could perform peace officer duties. Appellant protested the Department's refusal to reinstate him to the full duties of his position, but Department officials informed him that he still did not meet the qualifications of a peace officer: specifically, he had not had a polygraph examination, had not attended a basic peace officer academy, and was still refusing to cooperate and sign the waivers that would permit the Department's contracted provider, Advanced Fitness Evaluation Systems (AFES), to conduct a thorough background investigation.

On or about April 10, 2003, the Department served appellant with a Notice of Non-Punitive Termination, effective close of business on April 21, 2003 on the grounds that appellant had failed to attend a basic peace officer academy and further that he had failed to meet the requirements of Government Code section 1031, specifically, completion of a psychological evaluation and a background investigation. On April 25, 2003, the Department withdrew the Notice of Non-Punitive Termination, returning appellant to his previous, non-peace officer duties.[3]

At about this same time, on April 9, 2003, appellant wrote to the Board alleging that the Department was refusing to comply with the Board's decision by refusing to

[3] It appears that Department withdrew the Notice of Non-Punitive Termination after appellant presented evidence that he had successfully completed a POST Certified Basic Peace Officer Academy on April 6, 2003.

return him to his duties as a Warden. Pursuant to Government Code section 18710, appellant asked that the Department be ordered to show cause why it was not abiding by the Board's decision and order him reinstated to his duties as a Warden. In response to appellant's request for an order to show cause, the Department asserted that appellant was not entitled to return to his peace officer duties because he had not met all of the requirements for peace officer set forth at Government Code section 1031.

In a resolution dated May 20, 2003, the Board ordered that the matter be remanded for a hearing before an ALJ to determine what requirements, if any, appellant had to meet in order to perform the duties of a Warden and whether appellant had indeed met those requirements.

Subsequent to the Board's issuance of this resolution, the parties met in an attempt to settle the legal issues between them. The Department agreed to drop the requirement that appellant undergo a polygraph examination and to waive investigation into appellant's financial status. Appellant agreed to allow the Department to conduct a limited background investigation with the Department of Justice to check for any illegal activities or convictions, but continued to refuse to sign any waivers required by the Department and the Department's contracted provider, AFES, to complete a background investigation.

At the hearing, the parties informed the ALJ that they had stipulated to most of the issues in the case, but that the only issue left to be determined was whether appellant could be compelled to sign waivers releasing providers of information, as well as the Department and AFES, from liability so that the background investigation could

proceed.[4] At the hearing on June 27, 2003, officials from the Department testified that they did not have certified peace officer investigators who could perform background investigations and, therefore, they had to contract with AFES for this task. Further, they testified that AFES would not conduct the background investigation unless the appellant signed two releases or "waivers." The first waiver held AFES harmless for failing to make information obtained during the investigation known to the appellant and waived the appellant's right to see the information discovered during the investigation. The second waiver apprised the appellant that if any information involving criminal activity were to be discovered, AFES would advise the appropriate government authorities. Finally, Department representatives testified that they required a third, separate waiver be signed, which provided that appellant would not hold the party providing information in the investigation liable for any of the information he or she provided and, further, that the appellant would hold the Department harmless from liability.

Appellant testified that, while he did not necessarily mind if the Department conducted an investigation on him, he did not believe he was obligated, as a peace officer with rights under the Public Safety Officer Bill of Rights[5] (POBR) to waive any of his rights under the law and be compelled to sign these waivers in order to return to his former duties.

After hearing from both parties, the ALJ agreed with appellant's contentions, in part. In her Proposed Decision, she concluded that: 1) appellant was required to

[4] In her Proposed Decision, the ALJ notes that the parties did not submit a written stipulation for the record.

[5] Government Code section 3300 et seq.

execute waivers of liability releasing AFES, the Department, and any individual who provided information as part of the background investigation; 2) the Department's waiver was limited to matters that arose while appellant was on disability retirement and was valid for only one year, and; 3) appellant did not have to waive the discovery rights contemplated by POBR pursuant to Government Code section 3305.

At its meeting of August 5, 2003, the Board rejected the ALJ's Proposed Decision and decided to hear the matter itself. The Board asked the parties to address the issue of whether Government Code sections 1031 and 1031.1 required, or at least permitted, the Department to conduct a thorough background investigation on appellant before he could exercise his peace officer powers; and whether, as part of that investigation, appellant could be forced to sign the waivers of liability required by the Department and AFES.

ISSUE

Can the Department condition restoration of appellant's duties as a Warden upon his signing of the waivers and completing a background investigation?

DISCUSSION

Government Code section 1031 establishes minimum standards that all persons declared to be "peace officers" in the State of California must meet. Section 1031, subsection (d), provides that all peace officers must, "Be of good moral character, as determined by a thorough background investigation." The Department contends that, despite appellant's mandatory reinstatement by PERS, appellant should not be allowed to resume his former peace officer duties until he has completed a background investigation as contemplated by that section. In support of its position, the Department

contends that the legislative history of section 1031 reveals that the statute was designed to apply, not only to "first-time" applicants for a peace officer position but to persons, like appellant, who are "not currently employed" as a peace officer. In addition, the Department argues, as set forth below, that the courts have interpreted section 1031 to apply to peace officers reinstated from disability retirement, citing PERS' decision in Willie Starnes v. California Highway Patrol[6] and the California Supreme Court's decision in County of Riverside v. Superior Court[7].

On the other hand, appellant argues that he should not be compelled to sign the waivers at issue before having his peace officer duties restored. Appellant contends that requiring him to sign these waivers and undergo a new background investigation before resuming his former duties not only flies in the face of PERS' retirement laws, but would force him to surrender rights that he has under POBR.

After a review of the parties' arguments, as well as applicable law, we find appellant's argument convincing. Once PERS has determined that an employee is fit for duty and orders him reinstated, we believe the Department has no choice but to reinstate him, not only to the salary and benefits of his former position, but to substantially the same *duties* he or she previously held. As set forth at Government Code section 21190:

> A person who has been retired under this system for service may be reinstated from retirement by the board [PERS] as provided in this article, and thereafter may be employed by the state or by a contracting agency in accordance with the laws governing that service, in the same manner as a person who has not been so retired. (Emphasis added.)

[6] CalPERS Prec. Dec. No. 99-03 (January 22, 2000)

[7] (2002) 27 Cal.4th 793.

As expounded by the Board in numerous decisions, once PERS denies an employee's disability retirement application or orders an employee reinstated from disability retirement, the employer becomes immediately *obligated* to reinstate the employee to his or her former position.[8] While the Department has fulfilled at least part of its responsibility by reinstating appellant to the salary and benefits of his former position, it continues to refuse to return appellant to the job he previously enjoyed unless he completes a background investigation.

While the courts have not squarely addressed the issue, we conclude that the background investigation requirement referenced in section 1031, subdivision (d) does not apply to persons who are mandatorily reinstated from disability retirement.

First, we note that section 1031's minimum requirements are prefaced by Government Code section 1029.1, which provides:

> The Department of Corrections and the Department of the Youth Authority shall complete a background investigation, using as guidelines standards defined by the Commission on Peace Officer Standards and Training, of **any applicant for employment as a peace officer before the applicant may be employed or begin training as a peace officer.** In order to reduce potential duplication of effort by individual institutions, investigations shall be accomplished by each department on a centralized or regional basis to the extent administratively feasible. (emphasis added.)

This section implies that background investigations are to be conducted only for those persons *applying* for new positions *before* they begin work as a peace officer. Although the statute refers only to the Departments of Corrections and Youth Authority, it makes little sense that the background investigation requirement prescribed by

[8] See Dana Jackson (1993) SPB Dec. No. 93-01; Carole R. Mason (1993) SPB Dec. No. 93-08.

section 1031 would apply differently to persons employed as peace officers at some departments and not to peace officers at others. Section 1031 is silent as to whether the requirements contained therein apply solely to new applicants to peace officer positions or are broad enough to cover persons reinstating from disability retirement as well. The rules of statutory interpretation, as established by California law, dictate that various sections of a legislation scheme being harmonized with one another.[9] These same rules of statutory interpretation also dictate that legislation be interpreted in light of its "plain meaning" without having to add or clarify any language not already present in the statute.[10] In light of the use of the term "applicant" in the preceding section 1029 and in the absence of any language to suggest that 1031 was intended to also apply to current or reinstating peace officers, we presume that the Legislature intended section 1031 to apply only to "applicants" to peace officer positions and not persons such as appellant who are reinstating from disability retirement.[11] Had the Legislature intended that peace officers returning from disability retirement undergo an entire new background investigation before resuming their duties, it could have expressly stated so. In the absence of such specific directive however, we are hesitant to imply such a requirement.

In prior decisions, the Board has assumed that section 1031(d)'s background investigation requirement did not apply to peace officers reinstating to their positions

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[9] Bighorn-Desert View Water Agency v. Beringson (2004) 114 Cal.App.4th 1213, 1218.

[10] Bonnell v. Medical Board of California (2004) 31 Cal.4th 1255, 1261.

[11] Such an interpretation is consistent with POST regulations at Title 11 California Code of Regulations section 1002 which state that the background investigation required by section 1031(d) is to be conducted on or prior to an applicant's "appointment" date. It is also consistent with the Department's admitted policy of not requiring currently employed peace officers to have to undergo recurrent background investigations.

after disability retirement. In the Board's Precedential Decision Robert DeFord,[12] DeFord was unable to work as a correctional officer following an incident on the job. He ultimately agreed to take a "voluntary" demotion to a clerical position until he was healthy enough to return to his correctional officer duties. He was never told that in order to be reinstated to his former position, he would have to complete another background investigation. Subsequently, DeFord's doctor cleared him to return to his duties as a correctional officer. The department contended that he had only permissive reinstatement rights and, therefore, it could condition his reinstatement upon completion of another background investigation. DeFord took the position that his reinstatement was *mandatory* so that he need not comply with these conditions.

In DeFord, the Board concluded that the voluntary demotion in that case was similar to a constructive medical demotion or voluntary agreement to a temporary demotion. In either case, DeFord had a *mandatory* right to reinstatement upon resolution of his medical condition and the department could not condition his reinstatement upon fulfilling specific conditions or requirements.

In a subsequent non-precedential decision, Victor Fink,[13] the Board addressed this issue once again. In Fink, PERS ordered a State Traffic Officer with the California Highway Patrol (CHP) to be reinstated from disability retirement. After CHP appealed the decision and lost in the courts, it continued to refuse to reinstate Fink on the grounds that he was still not fit to perform all of the essential functions of the job of State

[12] (1992) SPB Prec. Dec. No. 92-05

[13] Victor Fink, SPB Case No. 00-2363, April 3, 2002. While having no precedential value, the Board may cite to its prior decisions as persuasive argument.

Traffic Officer. In discussing whether CHP's continued refusal to reinstate Fink constituted a constructive medical termination, the Board adopted the ALJ's Proposed Decision which examined the interplay between section 1031 and PERS' law and concluded:

> CHP cites no case law or other legal authority that additional continuing peace officer qualifications can be superimposed after PERS determines that an employee is no longer disabled, based solely on section 1031(f). The additional CHP 'clearance' process after a PERS reinstatement decision is similar to the additional medical releases rejected by SPB in Mason, supra, and the workers' compensation release rejected by the board in Ingersoll, supra.[14]

PERS has addressed the issue of whether section 1031's requirements supercede PERS' law requiring unconditional reinstatement. In its Precedential administrative decision Willie Starnes,[15] PERS addressed the issue of whether a department may be forced to reinstate a peace officer employee, upon reinstatement from disability retirement, when the department believes that the employee is incapable of performing peace officer duties. In Starnes, PERS noted that a state disability retiree

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[14] Fink, Proposed Decision at page 22. Both parties subsequently filed petitions for writ of mandate challenging portions of this decision. The Sacramento Superior Court denied appellant's petition but granted the CHP's petition on the ground the appeal was untimely. In the court's ruling, Judge Ohanesian discussed Government Code section 1031, subdivision (f) (the requirement that peace officers be free of any mental, emotional or physical condition) and its conflict with the retirement law requiring mandatory reinstatement after a finding of no disability. Of note, Judge Ohanesian found:

> The problem with CHP's argument is that Fink is not in the same position as a new applicant for employment with the CHP in the sense that he must affirmatively show that he meets the requirements of Government Code section 1031. The PERS board has already ordered that Fink be re-instated (sic) in that he is no longer disabled. Based on that ruling, Fink should be placed back in the status quo that existed before his disability retirement…The Court needs to harmonize the retirement law with the civil service law and with the laws pertaining to peace officers to the extent possible. CHP's position results in an extreme conflict between the retirement law and the civil service law and other laws pertaining to qualifications of peace officers.

Judge Ohanesian's decision has been appealed to the Court of Appeal, Third Appellate District, Case No. C044301, where it awaits a final decision.

[15] PERS Dec. No. 99-03.

is only *temporarily* separated from state employment under Title 2, California Code of Regulations section 446 and that temporary separations do not result in the loss of permanent civil service status. PERS noted:

> When the temporary separation ends, the person remains a permanent civil service employee whose status may only be changed, qualified or removed as provided by law. In this case, the evidence is clear and convincing that permanent employees are not subjected to the standard set forth in Government Code 1031(f). Therefore, there is no justification for applying this standard to respondent Starnes. After reinstatement, if it is determined that as a returning employee respondent Starnes fails to meet applicable personnel requirements, appropriate personnel action can be taken with proper remedies and protections afforded by personnel rules.[16]

PERS further noted that Government Code section 31725 (the statute requiring mandatory reinstatement after PERS' final decision that the employee is not disabled from working) did not exempt from mandatory reinstatement those employees who are not permanently disabled according to PERS, but who are deemed "not ready to return to work" according to their employer. PERS concluded that, once it determines that an employee is entitled to reinstatement, the department must reinstate the employee.[17]

We agree with PERS' interpretation of the interplay between the disability retirement statutes and section 1031. A previously-disabled peace officer who has been reinstated from disability retirement should be subject to no more onerous requirements than those imposed on currently working peace officers. While there are

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[16] PERS Dec. No. 99-03 at page 11, citing Cansdale v. Board of Administration, Public Employees Retirement System (1976) 59 Cal.App.3rd 656.

[17] Starnes at page 11, citing Phillips v. County of Fresno (1990) 225 Cal.App.3d at 1240. In Phillips, the Court of Appeal for the Fifth District noted that the reinstatement referred to was only to paid status, not necessarily active duty if the County felt that the employee was not physically, emotionally or mentally able to perform the strenuous and dangerous duties of the position. This case is distinguishable from Phillips as there is nothing in the record before us to indicate that the appellant in this instance is not physically or mentally able to perform the essential functions of the position.

specific training requirements applicable to peace officer employees who have been away from their positions for a period of time, these requirements have been expressly adopted by statute and POST regulation.[18] Nothing in this decision changes those specific requirements. In this case, though, given the lack of express directive in section 1031 as to its applicability to employees reinstating from disability retirement and given previous administrative interpretations by PERS and this Board, we conclude that the background investigation requirement set forth in section 1031, subdivision (d) does not apply to persons in appellant's position.

We also find validity in appellant's contention that requiring him to sign a waiver of his right to see the information provided to the Department as part of the background investigation would unfairly require him to waive his rights under POBR. POBR provides, in pertinent part at Government Code sections 3305 and 3306 respectively:

> No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer.
>
> A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.

[18] For example, Penal Code section 832, subdivision (e) provides that all peace officers returning from a three or more year absence, with certain exceptions, must again undergo basic peace officer training. See also, Title 11 California Code of Regulations section 1005 et seq.

Once reinstated as a peace officer, appellant is entitled to the protections of POBR, as the Department itself conceded at the hearing.[19] POBR's protections allow appellant to review any adverse comments received by the Department, and to respond to those comments. Requiring him to waive his right to see the materials informants provide in a background investigation would result in his waiving his rights under POBR.

Appellant cannot be required to waive his POBR rights as a condition to reinstatement. In County of Riverside v. Superior Court,[20] the City of Perris disbanded its police force, terminating employee Madrigal as a police officer. The County of Riverside, which took over police responsibilities for the city, rehired Madrigal and several other officers on a probationary basis, contingent on their passing a background investigation and polygraph examination. At the request of the county, Madrigal completed waivers, including a waiver of his right to see the information provided to the county as part of the background investigation. Several months later, Madrigal was dismissed from his position He sued to enforce his right under POBR to see the information provided to the county during the background investigation. The court noted that, had the county completed its background investigation prior to hiring him, Madrigal would have had no rights under POBR to view any of the background investigation materials because he would have had no employment relationship with the county. The court found, however, that because he was hired as a peace officer prior to the background investigation, he did have a right under POBR to view the materials,

[19] See transcript of June 27, 2003, page 27.

[20] (2002) 27 Cal. 4th 793

even if the materials were based on matters arising prior to his employment. The court concluded, however, that because Madrigal had signed a waiver of his rights to see the materials in order to quickly secure a job with the county, the waiver was signed voluntarily and was valid, so that Madrigal no longer had the right to view the materials. The court further concluded that, in cases where peace officers are transferring to different agencies, a waiver of one's POBR rights may be enforced as long as the waiver is limited to those matters that arose prior to the new employment.

While the county in Madrigal had the right to require a new employee to sign a waiver before being hired, the case before us is distinguishable. Madrigal did not have mandatory reinstatement rights to the position, but was a new employee to the county. If Madrigal had refused to cooperate in signing the waiver, the county could have simply have chosen not to hire him. In the instant case, though, appellant has a mandatory right to reinstatement to the position of Warden. We do not believe the Department can therefore condition his reinstatement to his peace officer duties upon requiring him to waive rights he has under POBR.

Thus, we conclude that the Department cannot require the appellant to sign the waivers in question before returning appellant to the full duties of the position of Warden. Moreover, we find that the background investigation requirement prescribed by Government Code section 1031, subdivision (d) does not apply to persons who are reinstated after disability retirement.[21]

[21] Subdivision (f)'s requirement, that peace officers be deemed free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer following a physical and mental examination, is not before this Board.

Should the Department learn that appellant engaged in misconduct or other questionable behavior while on disability leave, it is not entirely without recourse. It could arguably proceed with disciplinary proceedings under Government Code section 19572, assuming the behavior in question has a nexus with appellant's position and the action is otherwise valid under any applicable statute of limitations. Additionally, should the Department be aware that appellant is no longer qualified for the position under the terms of Government Code section 19585, it could file a non-punitive action to separate or demote appellant. Finally, should the Department have legitimate reason to believe that the appellant is not physically or mentally able to perform the essential functions of the position, it may reinstate appellant to his position and duties and then order a fitness for duty examination pursuant to Government Code section 19253.5.[22] In the meantime, we find that appellant is entitled to be reassigned to the peace officer duties he held prior to his disability retirement.

CONCLUSION

The Board recognizes that there may be reasons for requiring peace officers reinstating after disability retirement to undergo screening procedures similar to those required of new applicants. We cannot ignore the fact, however, that the law as it presently exists does not appear to impose such a requirement. If such a requirement is to be imposed, we believe it is the Legislature's duty to act. In the meantime, we find

[22] If the department believes that the employee is no longer fit to perform the duties of the position based upon the same reasons that the employee was on disability retirement, then the proper remedy to pursue is to appeal PERS' decision, not a medical action under Government Code section 19253.5.

that the appellant is entitled to be reinstated to all of the peace officer duties enjoyed by a Department of Fish and Game Warden.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The request for issuance of an Order to Show Cause why the appellant, Richard Coelho, has not been reinstated to the full duties of the position of Warden with the Department of Fish and Game is granted;
2. The Department is ordered to immediately return Richard Coelho to all of the duties of a Department of Fish and Game Warden, including any duties requiring peace officer status;
3. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD[23]
William Elkins, President
Maeley Tom, Member
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 12, 2004.

_____
Floyd D. Shimomura
Executive Officer
State Personnel Board

[Coelho.dec]

[23] Members Alvarado and Sheehan were not present when this case was heard.